

HEIR OF FRANK HOBSON

IBLA 90-64

Decided February 7, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request for reinstatement of previously relinquished Native allotment application. A-038241.

Affirmed.

1. Alaska: Native Allotments--Applications and Entries: Relinquishment

Where an affidavit in support of a claim that the relinquishment of a Native allotment application was involuntary and unknowing is insufficient to raise a genuine issue of material fact, and where the record shows that the applicant relinquished his Native allotment application to obtain a portion of the same land by means of a homestead entry application and later received a patent under the homestead laws, BLM properly denied a request to reinstate the Native allotment application.

APPEARANCES: Tred R. Eyerly, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Walya Hobson, the heir of Frank Hobson, has appealed a September 22, 1989, decision by the Alaska State Office, Bureau of Land Management (BLM), denying a request to reinstate Frank Hobson's Native allotment application A-038241.

On September 16, 1957, the Bureau of Indian Affairs (BIA), filed Native allotment application A-038241 on behalf of Frank Hobson. The application indicated use and occupancy of 160 acres of surveyed land within a portion of secs. 8 and 9, T. 3 N., R. 1 W., Copper River Meridian.

By letter of July 30, 1959, BLM notified Frank Hobson that his application was in order and invited him to submit proof of use and occupancy.

On July 6, 1962, BLM received a relinquishment form dated July 2, 1962, signed by Hobson relinquishing 4.88 acres of the above-described land. Also on July 6, 1962, Robert Marshall filed homestead application A-057702 for the 4.88 acres relinquished by Hobson. On August 5, 1966, Marshall received a patent for those lands, surveyed as lot 9, sec. 9, T. 3 N., R. 1 W., Copper River Meridian. ^{1/}

On September 12, 1963, BLM received a relinquishment form dated September 12, 1963, signed by Hobson and relinquishing "all lands" in A-038241. On the same day, Hobson filed homestead entry application A-059890 for 120.79 acres of the land relinquished in A-038241. On October 26, 1964, Hobson filed a partial relinquishment of the homestead entry application A-059890. He described "Section 8 - Lot 7 [and] Section 9 - Lot 2 west of Richardson Highway" as the land being relinquished. In a signed, handwritten supplement to the relinquishment, Hobson wrote:

"I will keep SE1/4 SE1/4 sec. 8 + Portion of SW1/4 SW1/4 west of Richardson Highway in Sec. 9 - T3N R1W CRM About 65 acres." On January 25, 1967, Hobson filed final proof under his homestead entry. On June 17, 1969, he received Patent 50-69-0218 for 65.39 acres described as sec. 8, SE1/4 SE1/4; sec. 9, lot 13, T. 3 N., R. 1 W., Copper River Meridian.

BLM's decision states that the lands relinquished by Hobson were subsequently patented out of Federal ownership.

By letter dated June 1, 1983, a realty specialist from BIA's Anchorage Office requested BLM to reactivate Hobson's Native allotment application A-038241. The realty specialist also requested a "copy of the letter sent to Frank Hobson regarding his involuntary relinquishment." On June 27, 1983, a BLM official advised BIA's realty specialist that no request for reinstatement of relinquished land had been received from Frank Hobson.

Frank Hobson died on September 12, 1984. The file contains an affidavit dated July 23, 1986, by Mary Hobson Levshakoff, Frank Hobson's daughter. Mary Hobson Levshakoff states in her affidavit that her father "never mentioned" relinquishing his Native allotment and that she believes her father did not know the implications of relinquishment. Another affidavit, dated November 12, 1984, by George Hobson, Frank Hobson's son, alleges that BLM's Glennallen office "pressured [Frank Hobson] into apply-ing for much less than the 160 acres he wanted." Two additional affidavits dated October 23, 1984, submitted by Frank Hobson's widow and another daughter allege that in 1963 Hobson was told by BLM that he had to sign a paper giving up the land.

On February 3, 1989, BIA filed with BLM a request that the Hobson Native allotment file be reactivated. Attached to the request was an affidavit by Frank Hobson dated March 12, 1984, which reads in part:

^{1/} BLM's case file on A-057702 indicates that the patent to Marshall was actually for 6.09 acres.

On 9-12-63 I went in the BLM office in Anchorage, on Cordova St. to file for my Native allotment. I had cleared the 160 acres and lived on it for the required 5 years. When I told the man behind the counter that I wanted to file for my 160 acres Native allotment, he told me that I couldn't have the allotment because they were cutting the Native allotments down in size (They being the people in Washington, D.C.). I told him that I had giving [sic] 5 acres to Robert Marshall so it wasn't 160 acres but only 155 acres. He still wouldn't let me apply. I told him that I would take it as a homestead instead, and he said that would be alright [sic]. Therefore, I relinquished 90 acres, thinking that this was the only way I could get some land. I finally got a homestead in 1967 for 65 acres.

I feel I was mislead [sic] and should be allowed to get what I originally applied for. And would like the BIA to help me do this.

BLM stated in its September 22, 1989, decision that its letter of July 30, 1959, clearly shows that Hobson's allotment application was accepted and the filing was found proper. In pertinent part, the July 30, 1959, letter to Hobson stated:

The Bureau of Indian Affairs has found that you are entitled to an allotment and we have found that your application is in order and that, insofar as our records show, the selected lands are available for allotment.

Before you can receive title to the lands, you must submit proof of substantially continuous use and occupancy of the lands for a period of five years.

BLM's decision stated further that the Hobson affidavit indicates the voluntary nature of the relinquishment of the 4.88 acres to Robert Marshall. As to the second relinquishment, BLM stated that rather than filing final proof under his allotment application, Hobson chose to file under the homestead laws. BLM concluded that the Hobson affidavit did not demonstrate that his relinquishments were unknowing or involuntary, and therefore denied the request for reinstatement of the allotment application.

Appellant contends that BLM erroneously ignored the affidavits from family members and improperly assumed that Hobson chose to receive a patent under the homestead laws rather than the Native allotment procedure. Appellant contends that a fair reading of the affidavits, especially the Frank Hobson affidavit, indicates that the relinquishments were unknowingly and involuntarily made. Appellant contends that in any event, the affidavits raise an issue of fact as to whether the relinquishments were knowingly and voluntarily made, and therefore a hearing is required. Citing Heirs of Linda Anelon, 101 IBLA 333 (1988), appellant asserts that BLM must accept the truth of the affidavits in determining whether there is a question of fact (Statement of Reasons at 8).

In Matilda Titus, 92 IBLA 340, 350 (1986), the concurring opinion outlined the procedure to be followed where BLM receives an application for reinstatement of a previously relinquished Native allotment application:

BLM has an obligation to investigate the circumstances of that relinquishment to determine whether reinstatement of the application is warranted. The investigation should include a determination of whether relinquishment was knowing and voluntary and whether the conditions for an allotment have been met. Thus, if BLM concludes that, but for the relinquishment, the application would have been approved, it should reinstate the application and pursue recovery of the land.

In Titus, there was an issue of material fact concerning the authenticity of a relinquishment document which was found to be "suspect on its face." The factual issue concerning the authenticity of the document had to be resolved before the Department could decide, as a matter of law, whether the relinquishment was knowing and voluntary. The Board remanded the case for a determination of this issue.

With respect to affidavits submitted to support a claim for reinstatement of a relinquished Native allotment application, the inquiry is whether such affidavits, accepting the truth of their factual allegations, are legally sufficient to raise a factual issue as to whether relinquishment was knowing and voluntary. If so, due process considerations require an oral hearing to resolve the issue. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978); Heirs of Linda Anelon, 101 IBLA at 337; Feodoria (Kallander) Pennington, 97 IBLA 350, 354-55 (1987).

[1] The record in the appeal now before us contains a BLM letter showing that BLM was ready to proceed to patent with Frank Hobson's Native allotment application upon a demonstration by Hobson that the statutory requirements regarding use and occupancy had been met. The Hobson affidavit asserts that on September 12, 1963, the applicant went to the BLM Office in Anchorage to "file for my Native allotment." Hobson's application having been filed in 1957, had been a matter of record for 6 years and required only proof of use and occupancy. Since no such showing was made, relinquishment of the application was not the only impediment to approval. Thus, the record does not demonstrate that but for the relinquishment, Hobson's application would have been approved.

The Hobson affidavit conveys the impression that the applicant relinquished 90 acres on September 12, 1963, the day he filed the homestead entry application. What Hobson's filings show is that on September 12, 1963, the applicant relinquished "all lands" in his Native allotment application. At that time, because of the previous relinquishment in favor of Marshall, approximately 154 acres remained in the allotment application, and this was the acreage that was relinquished. The applicant's homestead entry application, for 120.79 acres, was filed for the same land as that relinquished. The applicant's homestead entry application was on file

until over a year later when he relinquished all but 65.39 acres of it, by instruments filed on October 26, 1964. This third relinquishment, being a relinquishment of a portion of a homestead entry application, rather than a Native allotment application, is not before us in this appeal. Even if it were, the applicant's concise handwritten description of both the land he intended to relinquish and the land he intended to retain is indicative of a voluntary and knowing relinquishment.

With respect to the first relinquishment (some 5 acres of the Native allotment application in favor of Marshall), we find that the affidavit itself indicates that this relinquishment was knowing and voluntary. We find also, accepting the facts as stated in the affidavit, that no issue is presented as to whether the second relinquishment (the remainder of the allotment application), was unknowing or involuntary. Clearly, the applicant exchanged his allotment application for a homestead entry application embracing the same lands on the same day. The entire transaction occurred as a single event in which the applicant received something in exchange for relinquishment, and his affidavit evinces that this was his intent. Thus, the relinquishment was clearly knowingly and voluntarily made in order to receive conveyance of the land by other means.

The record shows that BLM has re-examined the circumstances of relinquishment as required in accordance with the Secretary's fiduciary responsibility to Natives to determine whether such relinquishment was knowing and voluntary. Contrary to Titus, supra, no genuine issue of material fact concerning the authenticity of the relinquishment documents is present in this case, nor is such an issue raised by the affidavits. Also, the present case is distinguishable from Pennington, supra, in that no misrepresentations of material fact are alleged as an inducement to relinquishment. Consequently no evidentiary hearing is required and appellant's request for one is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge